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January 12, 2007
(*Hand Delivery*)

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
International Trade Administration
Room 1870
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Ms. Kuhbach:

**Subject: Application of the Countervailing Duty Law to Imports from the
 People's Republic of China: Request for Comments**

On behalf of the Copper and Brass Fabricators Council, Inc. ("Council"), a trade association committed to preserving and enhancing U.S. trade laws, we submit the following response to the Department of Commerce's ("the Department" or "Commerce") request for comments on the applicability of the countervailing duty ("CVD") law to imports from the People's Republic of China.

The Council represents the principal copper and brass mills in the United States. The 19 member companies (see attached appendix A for a list of member companies) together account for the fabrication of more than 80% of all copper and brass mill products produced in the United States, including sheet, strip, plate, foil, bar, rod and both plumbing and commercial tube. These

products are used in a wide variety of applications, chiefly in the automotive, construction, and electrical/electronic industries.

The Council and its members are deeply concerned about the threat posed to U.S. manufacturing by Chinese imports, many of which continue to be subsidized by the Chinese government in violation of that country's WTO obligations. The Department has the authority to apply the CVD law to Chinese imports in order to ensure the continued effectiveness of that law as a remedy for U.S. companies and workers. The application of the CVD statute to China is consistent with statutory language and, while it would represent a change in the Department's practice, the Department has the authority to make such a change, and would be fully justified in doing so.

Neither the Commerce Department's 1984 determination in *Carbon Steel Wire Rod from Czechoslovakia*,¹ nor the Federal Circuit decision upholding Commerce, *Georgetown Steel Corp. v. United States*, preclude the Department from now concluding that the current CVD statute permits cases to be brought against China.

In *Wire Rod*, the Department, interpreting the then-applicable countervailing duty statute, Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303, concluded that "bounties or grants cannot be found in nonmarket economies." On appeal, the Court of International Trade reversed Commerce's determination, finding that the statute required Commerce to permit CVD cases to be brought against non-market economy (NME) countries. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

¹ *Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,370 (Dep't. Commerce, May 7, 1984) ("Wire Rod").

The Federal Circuit then reversed the Court of International Trade in *Georgetown Steel*. The Federal Circuit first rejected the CIT's conclusion that the CVD statute applied to NMEs as a matter of law. Instead, it found the statute to be ambiguous on the point, noting that "Congress has not defined the terms 'bounty' or 'grant' as used in Section 303. We cannot answer the question whether the statute applies to non-market economies by reference to the language of the statute." In light of this ambiguity, the court deferred to Commerce's interpretation of the statute, holding that "[w]e cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion."

It is thus crucial to understand that the Department's practice of not applying the CVD law to non-market economies, which it has followed since the *Wire Rod* determination, is not required by *Georgetown Steel* or by the statute. All the court decided in *Georgetown Steel* was that this practice reflected a permissible interpretation of an ambiguous statute.

The Department has acknowledged in recent correspondence with the General Accounting Office that "there is no explicit statutory bar against applying the CVD law to NME countries." Indeed, the adoption of a new definition of "subsidy" in the 1994 Uruguay Round Agreements Act (12 years after the *Wire Rod* decision), the Chinese accession to the WTO and the PNTR legislation (subsequent to the 1998 regulations in which Commerce last addressed this issue) all compel application of the CVD law to Chinese imports.

The plain language of the current countervailing duty statute permits its application to China. There is no limitation of the statute's applicability to countries with a particular political or economic system. Rather, on its face the statute applies to all countries. The only distinction

is between Subsidies Agreement countries, which are subject to the injury test requirement, and other countries, which are not.

Similarly, the plain language of the statutory definition of “countervailable subsidy” does not require that such a subsidy be granted by a market economy. Rather, the definition of “subsidy” merely requires that a government (or private entity funded by or under the direction of a government) make a financial contribution to a person, and thereby confer a benefit. Such subsidies are countervailable so long as they are “specific.”

At the very least, there is no doubt that Commerce may exercise its discretion to permit cases to be brought against China under the statute. Where the statute is silent or ambiguous on an issue, Commerce has the authority to determine its appropriate interpretation, and reviewing courts must defer to this interpretation so long as it is reasonable. Moreover, court deference to Commerce regarding such interpretations is heightened because Commerce is deemed to have unique expertise with respect to the antidumping and countervailing duty laws.

It would clearly be reasonable to interpret the CVD statute to apply to China. Commerce should interpret the statute broadly to maximize its ability to remedy unfair trade. It is clear that subsidized Chinese imports pose a massive threat to U.S. manufacturing. Application of the CVD law to China is thus not just reasonable, but necessary to give full effect to the remedial purpose of that law.

The *Wire Rod* determination and Commerce’s subsequent adherence to that decision do not operate as a legal bar to the application of the current CVD law to imports from China. It is beyond dispute that Commerce has the authority to reconsider its practice of not applying the CVD law to NME countries. As detailed below, there is ample justification for such reconsideration with respect to China.

The current CVD statute reflects and implements a very different international legal regime with respect to subsidies than did its predecessor statute that was interpreted in *Wire Rod*. The most significant change bearing on Commerce's analysis of whether to apply the CVD law to China is the fact that the country became a member of the WTO in 2001 and since then has been subject to the subsidies disciplines of the SCM Agreement. Indeed, China's WTO Accession Protocol confirms that the SCM Agreement permits WTO members to impose countervailing duties against NME countries. Specifically, Article 15(b) of the Protocol provides that proceedings under Part V of the SCM Agreement (relating to countervailing duties) are applicable to China, and moreover authorizes WTO members to "use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks."

This provision was immediately applicable to China upon its accession to the WTO and applies regardless of whether the WTO member applying the countervailing measure treats China as a non-market economy for the purposes of its antidumping law. The Protocol explicitly permits WTO members to continue to treat China as an NME for dumping purposes for up to 15 years from the date of China's accession, and there is absolutely no linkage in the terms of the protocol between China's NME status and the applicability of countervailing measures to that country.

There is no doubt that Congress, in authorizing permanent normal trade relations (PNTR) with China upon its accession to the WTO, intended for the United States to obtain the full benefit of the concessions made by China as prerequisites to its accession. Section 411 of the PNTR legislation, codified at 22 U.S.C. § 6941, notes that in order to obtain these benefits, "the

United States Government must effectively monitor and enforce its rights under the agreements on the accession of the People's Republic of China to the WTO.” The Report of the House Ways and Means Committee on the PNTR bill specifically noted China's adherence to WTO rules on subsidies as one of the aspects of China's WTO accession that would “benefit U.S. firms,” and which therefore must be monitored and enforced. Moreover, the PNTR legislation includes a provision authorizing additional appropriations for the Department of Commerce to, *inter alia*, “[defend] United States antidumping and *countervailing duty* measures with respect to products of the People's Republic of China,” demonstrating Congressional recognition that the SCM Agreement and China's Accession Protocols would permit the imposition of countervailing duties against Chinese imports.

China's acceptance of the disciplines of the SCM Agreement, including the potential application of countervailing duties to its imports, is an integral part of that country's WTO Accession protocol. Application of the CVD law against China is thus necessary to fully implement the rights of the United States under the Protocol, something that Congress clearly intended the United States to do in authorizing PNTR for China. The accession of China to the WTO thus provides Commerce with compelling reasons to reconsider its decision in *Wire Rod* and permit CVD cases to be brought against China, to fully implement U.S. rights under the Accession Protocol.

Further support for reconsideration of Commerce's practice of not applying the CVD law to China is found in the fact that the statute Commerce interpreted in *Wire Rod* no longer exists. It was repealed by the 1994 Uruguay Round Agreements Act (“URAA”) and replaced by the current statute, 19 U.S.C. §1671. The current statute does not refer to a “bounty or grant,” but

rather to a “countervailable subsidy.” More significantly the definition of “subsidy” at 19 U.S.C. § 1677(5) was revised by the URAA to correspond to the language of the SCM Agreement.

Because the restrictive interpretation of “bounty or grant” found in the *Wire Rod* determination forecloses CVD cases against countries subject to such cases under the SCM Agreement, this interpretation does not fully implement U.S. rights under the agreement and is therefore inconsistent with the revised definition of subsidy enacted by the URAA. As such, the SAA does not preclude the Department from reconsidering *Wire Rod* and interpreting the current CVD statute differently from Section 303 of the Tariff Act of 1930. Rather, such reconsideration is necessary in order to bring the Department’s practice in line with the new international legal order reflected in the SCM Agreement and to ensure that U.S. rights under the SCM Agreement are fully exercised.

Regardless of the validity of Commerce’s conclusion in *Wire Rod* that NMEs could not grant “bounties or grants” in 1984, it is clearly not accurate with respect to China in 2007. Indeed, China’s very accession to the disciplines of the SCM Agreement would be a pointless exercise if, as Commerce asserted in *Wire Rod*, “subsidies have no meaning outside the context of a market economy.” To the contrary, it is clear that China, despite continuing to meet the criteria for classification as a non-market economy under U.S. law, can and does grant subsidies within the meaning of Article 1 of the SCM Agreement, and thus, 19 U.S.C. §1677(5). While particular CVD cases involving China may present difficulties with respect to identification and quantification of subsidy programs (as is also the case in CVD investigations involving market economy countries), it is clearly possible to identify countervailable Chinese subsidy programs.

As discussed above, U.S. law clearly permits the Department to apply the CVD law to China. Moreover, such application is fully consistent with U.S. obligations under the SCM

Agreement, as China has specifically agreed to be subject to countervailing duty investigations immediately upon accession to the WTO, notwithstanding the fact that WTO members may continue to treat China as an NME country for antidumping purposes. As discussed in greater detail above, Article 15(b) of the Protocol provides for the application of CVD measures against China immediately upon that country's accession to the WTO, and is in no way linked to any determination by the member imposing the measure that China is a market economy. The Chinese government expressly agreed to adhere fully to the subsidies disciplines of the SCM Agreement as a condition of its entry into the WTO. This includes agreement to the possibility that CVD actions might be brought against Chinese imports by other WTO members. Application of the CVD law against China is thus necessary to enable the United States to fully exercise its rights under the Protocol.

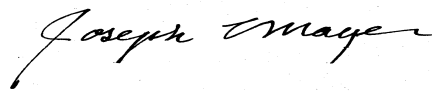
Finally, the practical concerns regarding the application of the CVD law to China raised by the Chinese government and other opponents of such use of the law are overstated and do not justify a wholesale refusal to apply the law to China. We agree with the Department of Commerce that such methodological concerns are highly fact-specific and best addressed in the context of a particular case. We note generally, however, that the principal difficulty raised by the application of CVD law to China – the need to determine appropriate benchmarks to use in the identification and quantification of subsidies – is explicitly addressed by Article 15(b) of China's Accession Protocol, which authorizes the United States to use third-country benchmarks in CVD cases against China. The use of such external benchmarks is fully consistent with U.S. law.

The alleged difficulties regarding the practical application of the CVD law to China or other NMEs are not unique. Even with respect to market economy countries, it may be difficult

in particular cases to identify or quantify subsidies, or to determine appropriate benchmarks to use in the Department's analysis. These difficulties, however, by no means justify a wholesale abandonment of the CVD laws. There is no doubt that Commerce has the authority, competence, and expertise to develop appropriate methodologies for the application of the CVD law against China in particular cases.

For the reasons discussed above, the Council urges the Department to reconsider its practice of not applying the countervailing duty law to non-market economy countries and to conclude that the law does apply to imports from China.

Sincerely,

A handwritten signature in black ink, reading "Joseph L. Mayer". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph L. Mayer
President
Copper and Brass Fabricators Council, Inc.

COPPER AND BRASS FABRICATORS COUNCIL, INC.

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